DOCKET FILE COPY ORIGINAL

A·C·L·I AMERICAN COUNCIL OF LIFE INSURERS
FINANCIAL SECURITY FOR LIFE

ROBERTA MEYER
SENIOR COUNSEL, RISK CLASSIFICATION
robbiemeyer@acli.com

RECEIVED & INSPECTED
MAY 0 7 2003
FCC - MAILROOM

May 5, 2003

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: CG Docket No. 02-278, FCC 03-62; Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991

Ladies and Gentlemen:

The American Council of Life Insurers ("ACLI") is pleased to respond to the Federal Communication Commission's (the "Commission") request for public comment on its further notice of proposed rulemaking regarding implementation of the Telephone Consumer Protection Act of 1991 (the "TCPA"). 68 *Federal Register* 16250 (April 3, 2002). The Commission's proposal was issued as a result of the recent enactment of the Do-Not-Call Implementation Act (Pub. L. 108-10), which directs the Commission to issue a final rule pursuant to its rulemaking proceeding initiated under the TCPA in September 2002 and to maximize consistency with the rules adopted by the Federal Trade Commission ("FTC"). 67 *Federal Register* 62667 (October 8, 2002).

The ACLI is the principal trade association of life insurance companies whose 383 member companies account for 73 percent of the assets of legal reserve life insurance companies in the U.S., 70 percent of life insurance premiums and 77 percent of annuity considerations. ACLI members are also major participants in the pension, long-term care insurance, disability income insurance and reinsurance markets. ACLI member companies are actively engaged in telemarketing activities with existing and prospective policyholders, insureds and annuitants. Accordingly, the ACLI and its member companies have a significant interest in the Commission's proposal.

As set forth below, the ACLI believes that the Commission's proposal would conflict with the McCarran-Ferguson Act and, therefore, the final rule should not be applicable to insurers. In the event the Commission should conclude otherwise, we have addressed several additional issues raised by the proposal as applied to insurers.

No. of Copies rec'd 0+1
List A B C D E

101 CONSTITUTION AVENUE, NW, Suite 700, WASHINGTON, DC 20001-2133
Telephone: (202) 624-2184 Facsimile: (202) 572-4808

THE MCCARRAN-FERGUSON ACT

In its notice of proposed rulemaking issued in 2002, the Commission requested comment on whether it should use its authority under the TCPA to extend a national do-not-call requirement to entities such as insurers that fall outside the FTC's jurisdiction. 67 *Fed. Reg.* 62667, 62676 (October 8, 2002). The ACLI believes that the Commission must consider the effect of the McCarran-Ferguson Act on its proposal. The McCarran-Ferguson Act provides, in relevant part, as follows:

> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.
>
> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair or supersede any law by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . .

15 U.S.C. § 1012.

The purpose of McCarran-Ferguson is to permit the states to continue as the primary regulatory authority over the business of insurance. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 413 (1954). One of the major arguments presented for leaving regulation of the business of insurance to the states is that the states are in close proximity to the people affected, and therefore the states are in a better position to regulate the insurance business than is the Federal government. *See*, *e.g.*, 91 *Cong. Rec.* 1087.

The McCarran-Ferguson Act prohibits an act of Congress from invalidating, impairing or superseding any state law that was enacted for the purpose of regulating the business of insurance unless the federal act specifically relates to the business of insurance. Courts have held that the sale and issuance of insurance policies are the business of insurance under the McCarran-Ferguson Act. *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 459-460 (1969). Accordingly, the sale of insurance through telemarketing would appear to be encompassed within the term "business of insurance" under McCarran-Ferguson.

There is nothing in the language of the TCPA that specifically relates to the business of insurance. Accordingly, if the Commission's proposal, which is based upon authority conferred by the TCPA, would "invalidate, impair or supersede" state law enacted for the purpose of regulating the business of insurance, it would not be applicable to insurers. The ACLI believes that the Commission's proposal intrudes upon the insurance regulatory framework established by the states and disrupts the balance established by the state. *See Doe v. Norwest Bank Minnesota*, 107 F. 3d 1297, 1307 (8th Cir. 1997); *Kenty v. Bank One, Columbus, N.A.*, 92 F. 3d 384, 392 (6th Cir. 1996). The laws of virtually every state regulate the sale of insurance via telephonic and other means. *See, e.g.* D.C. Code § 31-2231.03, .10 (2003) (prohibits misrepresentations in connection with sales presentations; requires maintenance of records relating to marketing activities). Applying the Commission's proposal to insurers, whose marketing activities are extensively regulated at the state level, would disrupt the orderly administration of state law and, in our view, conflict with the McCarran-Ferguson Act. Accordingly, we believe that the Commission should consider the effect of the McCarran-Ferguson Act on its proposal and conclude that the final rule will not apply to insurers because it would interfere with insurance activities that are already subject to extensive state regulation.

Notwithstanding our belief that the Commission's final rule should not apply to insurers, we nevertheless would like to take the opportunity to provide comments on certain aspects of the proposal.

EXISTING BUSINESS RELATIONSHIPS

The Commission's current rule does not prohibit a company from communicating with consumers with whom it maintains an "established business relationship." 47 C.F.R. § 64.1200(c)(3). An established business relationship is defined as

> [A] prior or existing relationship formed by a voluntary two-way communication between a person or entity with a [consumer] with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

47 C.F.R. § 64.1200(f)(4).

The FTC's Telemarketing Sales Rule, however, defines an "established business relationship" as a purchase, rental or lease of goods or services between a person and a consumer within the preceding 18 months, or an inquiry or application between the parties within the past three months. 16 C.F.R. § 310.2(n). The ACLI believes that the definition currently appearing in the Commission's rule is the appropriate standard and should be maintained.

The insurance business is quite different from other types of businesses. Insurers, their representatives and licensed insurance professionals often call consumers to provide information about enhancements to existing products or services, to provide information about new products or services likely to be of interest or benefit to consumers and to make recommendations for action. Relationships between insurers and policyholders, insureds and annuitants, as well as between licensed insurance professionals and their clients, typically extend for many years. A consumer may purchase an insurance policy or annuity from a company and may not contact the company or the consumer's licensed insurance professional for several years thereafter. Nevertheless, the insurance policy or annuity remains in force and a business relationship exists between the parties. Telephone calls by insurers, their representatives, and licensed or registered insurance professionals to consumers with whom they have an established or existing business relationship should not be regulated and should be exempt from any do-not-call list.

In view of the unique nature of the insurance business, we believe that if the FTC's definition of the term "established business relationship" were to be applied in the context of the insurance business, it would inappropriately restrict the ability of insurers, their representatives and licensed insurance professionals to contact persons with whom they maintain relationships in order to make those persons aware of new products and services that may benefit them. The FTC's definition of "established business relationship" was not adopted with the insurance industry in mind because the FTC's rule does not apply to insurers. Under the FTC's definition, there would be a question as to whether an "established business relationship" exists between an insurer and a customer when the customer purchased the policy several years ago. Because the FTC's definition is transaction based (*i.e.,* the product had to be purchased within the past 18 months), a literal application of the FTC's definition would suggest that an established business relationship does not exist when a policy that remains in force had been purchased by the customer more than 18 months previously. We believe that it is reasonable and appropriate for the Commission to take into account the unique manner in which the insurance industry conducts business and establishes relationships with its customers. Accordingly, we believe the Commission should maintain its current definition of "established business relationship."

PREEMPTION OF STATE DO-NOT-CALL LAWS

The Commission has asked whether state telemarketing laws should be pre-empted. Differences between the Commission's proposal and the plethora of differing state telemarketing laws would give rise to potential confusion both for consumers and for entities subject to these requirements. The many differences in these rules also would give rise to potentially burdensome administrative obligations, the costs of which are likely to be ultimately borne by consumers without commensurate enhanced privacy benefits. If the Commission adopts a national do-not-call registry, the ACLI believes that it would be appropriate for the Commission to pre-empt existing state do-not-call requirements in order to ensure that consumers are treated uniformly on a nationwide basis. A national, preemptive law providing for a uniform national do-not-call registry would protect the privacy of consumers who wish to avoid unsolicited and unwanted telephone sales calls. At the same time, it would eliminate the confusion and administrative costs necessarily arising from the current patchwork of widely divergent state requirements, which will be further exacerbated by the overlay of the Commission's rule.

PRIVATE RIGHT OF ACTION

The TCPA Rule provides a consumer with a private right of action in state court if the consumer receives more than one telephone call within any 12-month period by the same company in violation of the telephone solicitation provisions of the TCPA Rule. The Commission has requested public comment on whether to extend the consumer's ability to bring an action against a company that violates other provisions of the TCPA Rule. In view of the significant operational changes that are required to implement a Commission mandated nationwide do-not-call registry, the ACLI believes that it would be unfair to expose insurers to private rights of action for unintentional or inadvertent violations. The ACLI believes that the Commission's rule should provide that a violation does not occur if the institution, its representatives and licensed professionals, in good faith, establish and implement reasonable practices and procedures designed to prevent violations of the rule.

FREQUENCY OF UPDATES AND ACCESS TO THE REGISTRY

The ACLI believes that the Commission should provide that the do-not-call registry will be updated no more frequently than quarterly. Companies should have at least 45 days after registry updates are made available to implement the updated registry. Shorter periods could prove operationally burdensome to insurers, particularly those who operate on a nationwide basis. The ACLI believes that requiring updates no more frequently than quarterly would provide a reasonable balance between the privacy interests of consumers and the operational burdens placed on insurers.

The ACLI further believes that a national do-not-call registry should include the consumer's name as well as his or her telephone number. This will ensure that insurers will be permitted to contact their existing customers notwithstanding the fact that another person who uses the same telephone number has registered the telephone number.

In addition, the ACLI believes that the Commission should permit insurers that acquire the registry to disseminate it to their representatives and affiliated companies. Because of the unique nature of the insurance industry, many insurers have structured their businesses to make use of representatives and affiliates. The ACLI believes that it would be inappropriate to require each representative of the company, as well as each entity in the corporate family, to purchase separate copies of the registry, particularly if compliance with the do-not-call requirement is conducted on a company-wide basis.

The ACLI appreciates the opportunity to provide its views on the Commission's proposal. We would be pleased to answer any questions you may have relating to our comments.

Sincerely,

Roberta B. Meyer

Roberta B. Meyer